LIBRARY
COURT, U.S.
Office-Supreme Court, U.S.
FILED
NOV 14
JOHN F.

IN THE

Supreme Court of the United States

October Term, 1961

No. 550

ANTHONY MARCHITTO,

Petitioner,

—v.—

WATERFRONT COMMISSION OF NEW YORK HARBOR.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
Attorneys for Petitioner,
25 Broad Street,
New York 4, N. Y.

RABINOWITZ & BOUDIN,
ARTHUR SCHUTZER,
Of Counsel.

Dated, November 12, 1961.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions and Statutes Involved	3
Statement	3
Reasons for Granting the Writ	9
Conclusion	19
APPENDIX A—The Constitutional Provisions and Statutes Involved	20
APPENDIX B—Further Statement of Manner in Which Federal Questions Sought to Be Reviewed Were Raised	25
APPENDIX C—Opinion at Special Term	29
APPENDIX D—Order of Court of Appeals	30
Order of Supreme Court, New York County, Special Term	31

Table of Cases

Berger v. United States, 295 U. S. 78	14
Byars v. United States, 273 U. S. 28	16
Blackmer v. United States, 284 U. S. 421	10
Bowers v. United States, 202 F. 2d 447 (C. A. D. C., 1953)	4
Carpenter v. Spooner, 2 Sandf. 717 (1850)	12
Cohn v. Kramer, 136 F. 2d 293 (C. A. 6, 1943)	11
Cooke v. United States, 267 U. S. 517	11
Delaware River Joint Toll Bridge v. Colborn, 310 U. S. 419	11

PAGE

De Veau v. Braisted, 363 U. S. 149 11
DiCarlo v. United States, 102 F. Supp. 597 (N. D. Ohio, 1952) 15
Dyer v. Sims, 341 U. S. 22 11

Elkins v. United States, 364 U. S. 206 16

Feldman v. United States, 322 U. S. 487 16
Fong Yue Ting v. United States, 149 U. S. 698 10

Gampel v. Gampel, 114 N. Y. S. 2d 474 12
Gibson v. Florida, Oct. Term, 1961, No. 70 18
Goldsmith v. Board of Tax Appeals, 270 U. S. 117 ... 9
Green v. Biddle, 8 Wheat. (21 U. S.) 1 15

Hovey v. Elliott, 167 U. S. 409 11

In re Oliver, 333 U. S. 257 ..... 9, 10, 11
In re Rockhill, 70 F. Supp. 465 (D. C., D. N. J. 1947) 11
In re Waterfront Commission v. Moody, S. Ct. N. J., Hudson County 16

Jay v. Boyd, 351 U. S. 345 10

Kilbourn v. Thompson, 103 U. S. 168 17
Knapp v. Schweitzer, 357 U. S. 371 ..... 15, 16

Liveright v. United States, Oct. Term, 1961, No. 11 .. 18
Lustig v. United States, 338 U. S. 74 16

Maltez v. Nagle, 27 F. 2d 835 (C. A. 9, 1928) 10
Matter of Barnes, 204 N. Y. 108 17
Mills v. Louisiana, 360 U. S. 230 16
Morgan v. United States, 304 U. S. 1 9
Murphy v. Waterfront Commission, Oct. Term, 1961, No. 362, *cert. den.*, 30 L. W. 3144 14

Neotex Mfg. Co. v. Eidinger, 250 App. Div. 504 (App. Div., 1st Dept., 1939) 12

Petty v. Tennessee-Missouri Bridge Comm., 359 U. S. 275 ..... 11, 14, 15, 17
President, Managers, and Co. v. Trenton City Bridge Co., 13 N. J. Eq. 46 (1860) 15

PAGE

Raley v. Ohio, 360 U. S. 423 14
Re Savin, 131 U. S. 267 10

Sacher v. United States, 356 U. S. 576 17
Sardo v. McGrath, 196 F. 2d 20 (C. A. D. C., 1952) .. 10
Scull v. Virginia, 359 U. S. 344 18
Sorrells v. United States, 287 U. S. 435 14
State v. Faudre, 54 W. Va. 122, 46 S. E. 269 (1903) . 15
State v. Hoofman, 9 Md. 28 (1856) 15
Svarney v. United States, 7 F. 2d 515 (C. A. 8, 1925) 10
Sweezy v. New Hampshire, 354 U. S. 234 18

Tickle v. Barton, 142 W. Va. 188, 95 S. E. 2d 427 .. 14
Tinsley v. Anderson, 171 U. S. 101 10

Ullman v. United States, 350 U. S. 422 15
Ungar v. Seaman, 4 F. 2d 80 (C. A. 8, 1924) 10
United States ex rel. Knauff v. Shaughnessy, 338 U. S. 537 10
Uphaus v. Wyman, 360 U. S. 72 18

Watkins v. United States, 354 U. S. 178 17
Wolf v. Colorado, 338 U. S. 25 16
Wong Yang Sung v. McGrath, 339 U. S. 33 ..... 9, 10

CONSTITUTION:

Art. 1, § 10, cl. 3 11
Fifth Amendment 11
Sixth Amendment 11
Fourteenth Amendment 11

Statutes

CIVIL PRACTICE ACT OF NEW YORK:

§ 237-a 5, 6
§ 322 ..... 6, 7

PAGE

WATERFRONT COMMISSION ACTS:

N. Y. Laws, 1953, c. 282; McKinney Unconsol. L., § 6700-a *et seq.*; N. Y. Laws, 1953, c. 202, 203: N. J. S. A. 32; 231 *et seq.* 2, 3, 5, 11, 12

Act of August 12, 1953, c. 407, 67 Stat. 541 3

Articles, Miscellaneous

FRANKFURTER AND LANDIS, THE COMPACT CLAUSE OF THE CONSTITUTION:

A Study in Interstate Adjustments, 34 Yale Law Journal 685 14

JURISDICTION BY TRICKERY: ENTICEMENT FOR SERVICE OF PROCESS:

7 Duke Law Journal 52 (1957) 14

KRONER—SELF-INCRIMINATION:

Self-Incrimination: The External Reach of the Privilege, 60 Col. L., Rev. 816 (1960) 16

LEACH, THE FEDERAL GOVERNMENT AND INTERSTATE COMPACTS:

29 Ford. L. Rev. 421 (1961) 15

ZIMMERMAN AND WENDELL:

The Interstate Compact Since 1925 (1951) 15

IN THE

Supreme Court of the United States

October Term, 1961

No.

—o—

ANTHONY MARCHITTO,

Petitioner,

—v.—

WATERFRONT COMMISSION OF NEW YORK HARBOR.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a Writ of Certiorari issue to review the order of the Court of Appeals of the State of New York made on October 5, 1961 which denied petitioner's motion for leave to appeal from an order of the Appellate Division, First Department unanimously affirming an order made herein on March 20, 1961 by the Supreme Court of the State of New York adjudging the petitioner in civil contempt and committing him to prison until he answers certain questions of the Waterfront Commission of New York Harbor.

Opinions Below

There were no opinions in the Court of Appeals or in the Appellate Division. The opinion in the Supreme Court of the State of New York (herein called Special Term) adjudging the petitioner in civil contempt has not been officially reported and is printed in the Appendix, *infra*, page 30. The orders of the Court of Appeals, and the Supreme Court are likewise printed in the Appendix, *infra*, pp. 29 *et seq.*

Jurisdiction

The order of the Court of Appeals of the State of New York denying petitioner's motion for leave to appeal was entered on October 5, 1961. On October 13, 1961, Mr. Justice Harlan granted petitioner's application for a stay herein pending the filing and disposition of a petition for a writ of certiorari, provided the petition were filed on or before November 14, 1961 and petitioner post a surety bond in the sum of $10,000. Said bond has been duly posted, approved and filed. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

Questions Presented

Petitioner was adjudged in civil contempt in a proceeding instituted in the Supreme Court of the State of New York by respondent Waterfront Commission of New York Harbor by reason of his refusal on the ground of constitutional privilege to answer certain questions put to him by the Commission. The Commission is an agency created by the Waterfront Commission Act, an interstate compact enacted by the States of New York and New Jersey with the consent of Congress. In this context, the questions presented are:

1. Whether petitioner was denied due process where he was denied the hearing he demanded in the quasi-criminal contempt proceedings and was adjudicated in contempt solely upon affidavits.

2. Whether petitioner was adjudicated in contempt in violation of the Waterfront Commission Act in that (a) he was immune from process instituting the contempt proceedings while in New York pursuant to a Commission subpoena to testify, and (b) the Commission failed to comply with the statutory conditions precedent to the grant of immunity.

3. Whether petitioner was deprived of due process because his entry into the State of New York was enticed by the Commission's fraud and misrepresentation in order to serve him with process in the contempt proceeding.

4. Whether an agency created by interstate compact with the consent of Congress which collaborates with other agencies of the federal government in the investigation of federal crime can compel testimony in the absence of immunity from federal prosecution.

5. Whether such an agency is subject to the requirements of due process as declared by this Court to be applicable to Congressional and state legislative committees.

Constitutional Provisions and Statutes Involved

The constitutional provisions involved are Article I, § 10, cl. 3 and the Fifth, Sixth and Fourteenth Amendments to the Constitution.

The statutes involved are the Waterfront Commission Act, an interstate compact enacted by the States of New York and New Jersey (New York Laws, 1953, c. 282, McKinney Unconsol. Laws (6700-a, *et seq.*; New York Laws 1953, c. 202, c. 203, N. J. S. A. 32; 23 1, *et seq.* with the consent of Congress, 67 Stat. 541, Act of August 12, 1953, c. 407). The New York statutes now appear as McKinney Unconsol. Laws, Title 29, Sections 9801-9937.

The pertinent constitutional and statutory provisions appear in the Appendix, *infra*, pages 20-25.

Statement

Petitioner is a life-long resident and citizen of the State of New Jersey where he has been employed for more than twenty-five years (R. 70). Respondent is the Waterfront Commission of New York Harbor (herein called the "Commission") created by an interstate compact, the Water-

front Commission Act, *infra*, pages 21-24, in order to eliminate evil conditions on the New York waterfront. The Commission is authorized to license and register waterfront workers, to investigate waterfront practices, and to recommend the improvement of waterfront conditions.

Petitioner was alleged by the Commission to be a trustee of two local unions of the International Longshoremen's Association (herein called the "ILA") (R. 92). Neither local is claimed to be within the Commission's jurisdiction since they are warehouse rather than waterfront unions. Their members are not required to be licensed under the compact and their employers are not governed by the compact (R. 94-95).

In early June, 1960, petitioner came from New Jersey to New York in response to a subpoena which had been served upon him in New Jersey and whose validity he had unsuccessfully challenged in the New Jersey Courts (R. 92, 93). He was interrogated by the Commission in executive session in the course of which he asserted his constitutional privilege against self-incrimination (R. 111).

Thereupon, he was directed to appear before the Commission on June 22, 1960, in a public session where he was again ordered to answer substantially the same questions and purportedly offered immunity against prosecution for state, not federal, crime. The Commission did not indicate the subject matter of the investigation, the purpose of the investigation, or the pertinency of the questions. Some of them were of the kind held not pertinent in *Bowers* v. *United States*, 202 F. 2d 447 (C. A. D. C., 1953); others, such as petitioner's involvement in department store and drug store strikes, were seemingly irrelevant to an investigation of waterfront conditions.

Petitioner declined to answer the questions on the ground that the Commission had failed to comply with the conditions precedent to an offer of immunity. In this Court,

we limit the claim of non-compliance to two facts: (1) non-compliance with the statutory provision that notice of the offer of immunity be given to all state officials "having an official interest therein"; and (2) non-compliance with the constitutional requirement that in a case of this kind, federal immunity must also be given (*infra*, p. 14).

The Commission then directed the petitioner to return the following day from his home in New Jersey to the Commission's public hearing in New York, purportedly to testify before the Commission. Apparently, however, its purpose was to subject him to service of process in the instant contempt proceedings (R. 42, 71-73).

Upon his return to New York, on June 23, 1960, the Commission made a *pro forma* inquiry of petitioner as to whether he had "changed your position" (R. 74). It then served him with the order to show cause instituting these proceedings to adjudge him in contempt. Whereupon, petitioner moved at Special Term to vacate service under Section 237-a of the Civil Practice Act upon the grounds: (1) that he was exempt from service of the said order to show cause by reason of the provisions of the Waterfront Commission Act, Part II, Section 5-m, McKinney Unconsolidated Laws, Section 6700, tt-13; and (2) that he had been enticed by the Commission into the State of New York for the purpose of service of process (R. 68, 69).

The first ground of the motion involving the federal question of the construction of an interstate compact was raised in petitioner's cross-notice of motion (R. 68) and in his affidavit (R. 70). See also, *infra*, p. 11. The second ground, involving a denial of due process, is similarly set forth (*ibid.*).

The motion was denied by the Supreme Court Special Term, New York County, (R. 84-85) and the order of denial was affirmed by the Appellate Division upon an interlocu-

tory appeal. Petitioner preserved the jurisdictional point in the subsequent contempt proceedings as he was entitled to do under Section 237-a, sub. 3(c) of the Civil Practice Act (R. 164). On August 2, 1960, petitioner moved in the Supreme Court, New York County to take the deposition of the Waterfront Commission by its agents and for a discovery (R. 87-90). His affidavit recited his prior appearance in the executive session of the Commission on or about June 2, 1960, stated that the questions at the executive and public sessions were essentially the same, and that "the purpose of conducting a public session, June 22, 1960, was therefore an improper one, and solely for the purpose of exposing your deponent and violating his right of privacy" (R. 93).

Petitioner also stated the necessity of a deposition and discovery to support his claim as to lack of *bona fides* in subpoenaing him and offering him immunity, failure to make luminous the subject matter of the investigation, failure to comply with the applicable statutes as condition to an immunity grant, and the fact that the subpoenas were the result of collaboration between the Commission and specified federal agencies. (See Appendix C, *infra*, pp. 26-28.) The denial at Special Term of the motion for discovery and inspection at Special Term (R. 140-46) was affirmed by the Appellate Division.

On June 28, 1960, petitioner served the Commission with a notice to admit facts pursuant to Section 322 of the Civil Practice Act (R. 148-161). The facts set forth therein would, if proven, conclusively establish (1) absence of Commission jurisdiction, valid investigative purpose, and compliance with statutory conditions to immunity; and (2) Commission exercise of federal functions and collaboration with federal agencies in the instant investigation, subpoenaing and enticement of petitioner into the jurisdiction of New York (*R. ibid.*). Under New York Law, those facts are deemed admitted, in the absence of "a sworn statement

either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters", C. P. A. § 322, except in certain situations not relevant herein. The Commission failed to make a denial in accordance with the statute (R. 162).[1]

Thereafter, the motion to adjudge in contempt came on to be heard before Special Term. Petitioner opposed the motion by affidavit (R. 163, 177) which noted the refusal to respond to the notice to admit (R. 176, 177), reasserted his jurisdictional challenge, asserted that the denial of deposition and discovery violated his constitutional and statutory rights (R. 163-164) and demanded a hearing:

> "* * * a decision should not be made upon the basis of an affidavit, particularly of a generalized and inadequate form presented by the Commission, but should be supported by testimony of witnesses subject to cross-examination by your deponent's counsel, with the additional protection of the granting of the motion to take the depositions and to have a discovery and inspection." (R. 171)

Petitioner also challenged each of the contentions made by the Commission. He charged, *inter alia*, with support-

---

[1] Among the significant facts set forth in the notice were the following: The Commission's intention "to publicize in the form of a public hearing respondent's * * * reliance upon his constitutional privilege against self-incrimination" (No. 29); that "respondent was not apprised by the petitioner on June 22, 1960, as to the subject matter of the investigation or as to the pertinency of any of the questions put to the respondent" (No. 30); that "the instant investigation in which the respondent was called as a witness * * * was the result of collaboration between [the Commission] and agents of the Federal Government including * * * the Federal Bureau of Investigation" (No. 34); that "the [Commission's] inquiries made of * * * [petitioner] related to persons in counties other than those whose prosecutors were given notice * * *" (No. 40); that in instructing petitioner to return, the Commission did not "intend to have respondent return to New York State for the purpose of adducing testimony", No. 45 (R. 148-161).

ing facts, that the Commission "is engaged * * * in active collaboration with federal agencies" and that its accusations relate to "a wide variety of federal crimes in the area of labor relations" (R. 167); that "the Commission's papers do not show that it has jurisdiction over the subject matter of this investigation" (R. 168); that its papers "do not show the pertinency of the questions" and that "these questions are not pertinent to any investigation" (R. 168); that its purpose in subpoenaing petitioner "was not the bona fide one of carying out the purposes of the Waterfront Commission Act and of adducing information necessary as a basis for recommendations to the Legislatures * * *" (R. 169).

Denying the requested hearing, Special Term decided the case solely upon affidavits in a short opinion, *infra*, p. 29, making no finding concerning jurisdiction, public purpose, pertinency or luminosity (R. 177).

It directed petitioner's indefinite commitment until he answered the questions (*infra*, 36). The Appellate Division, First Department, affirmed that final order. After petitioner's appeal as of right was dismissed, he moved the Court of Appeals for leave to appeal from the Appellate Division's orders in the proceeding to adjudge in contempt and in the application to take a deposition and discovery. Petitioner raised, in an affidavit of counsel and in an accompanying brief, the various issues of federal constitutional right and construction of the interstate compact (*infra*, pp. 25-28).

The Court of Appeals denied petitioner's motion for leave to appeal from the final order in the contempt proceeding. It dismissed the motion insofar as it related to the depositional aspect of the case.

Reasons for Granting the Writ

1. This case presents an important constitutional question under the Fourteenth Amendment, which, it is submitted, was determined by the courts below in a manner irreconcilable with this Court's decision in *In re Oliver*, 333 U. S. 257.

The adjudication of contempt herein was made solely upon affidavits and without a hearing which petitioner had specifically demanded (R. 171). The denial of due process was compounded by the withdrawal from petitioner of all defensive methods normally available under New York procedure.

Thus, he was denied the opportunity to prove his charges through deposition and discovery. The allegations which he set forth in his Notice to Admit were not contested and are necessarily deemed admitted under New York Law; none of the courts below question that fact. This case thus presents the novel situation in which although all of petitioner's contentions are deemed admitted (*supra*, pp. 6, 7), he was denied the opportunity to buttress his case by a deposition or discovery, his demand for hearing was rejected, and he was adjudged in contempt on the basis of affidavits whose allegations he contested.

Even in cases not involving commitment to prison, this Court has held that due process requires a fair hearing. *Morgan* v. *United States*, 304 U. S. 1; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123. "When the Constitution requires a hearing, it requires a fair one * * *." *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50. And confrontation and cross examination are essential ingredients of a fair hearing:

> "* * * A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights in-

clude, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel * * *." *In re Oliver*, 333 U. S. 257, 273.

Even in deportation cases, an area of alien control where the jurisdiction of the Executive has been characterized variously as "inherent in the executive power" (*United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 542), and "absolute and unqualified" (*Fong Yue Ting* v. *United States*, 149 U. S. 698, 707), due process has consistently been held to require confrontation and cross-examination. *Ungar* v. *Seaman*, 4 F. 2d 80, 82 (CA 8, 1924); *Maltez* v. *Nagle*, 27 F. 2d 835, 837 (CA 9, 1928); *Svarney* v. *United States*, 7 F. 2d 515, 517-518 (CA 8, 1925); *Sardo* v. *McGrath*, 196 F. 2d 20, 22 (CA DC, 1952); see *Wong Yang Sung* v. *McGrath*, *supra*, 339 U. S. at 50; *cf. Jay* v. *Boyd*, 351 U. S. 345.

The present case presents an even more compelling claim to a hearing since the demands of due process are much greater in a contempt proceeding, which is quasi-criminal in nature. This Court has declared that "due process of law as explained in the *Cooke* case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation." *In re Oliver*, 333 U. S. 257 at 275, citing *Cooke* v. *United States*, 267 U. S. 517.

Consistently, contempt adjudications have been preceded by hearings at which witnesses testified (*Re Savin*, 131 U. S. 267; *Tinsley* v. *Anderson*, 171 U. S. 101; *Blackmer* v. *United States*, 284 U. S. 421. Where hearings were denied, contempt adjudications were vacated. *Cooke* v. *United States*, *supra*; *In re Oliver*, *supra*.

Petitioner's treatment is condemned by this Court's decision in *Hovey* v. *Elliott*, 167 U. S. 409, where in a different context a lower court claimed the right "to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refused to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of contempt of court."[2]

"The construction of a compact sanctioned by Congress under Art. I, § 10, cl. 3, of the Constitution presents a federal question. *Delaware River Joint Toll Bridge Commission, Pennsylvania—New Jersey* v. *Colburn*, *supra*, 310 U. S. at page 427 • • •. Moreover, the meaning of a compact is a question on which this Court has the final say. • • •" *Petty* v. *Tennessee Missouri Bridge Comm.*, 359 U. S. 275, 278. This is particularly appropriate in view of the active role played by the Congress in the establishment of this Compact. *De Veau* v. *Braisted*, 363 U. S. 149-150.[3]

Pursuant to this rule, petitioner seeks this Court's construction of the Waterfront Commission compact in two respects: first: was he immune from process under the explicit terms of the Waterfront Commission Act, and second, can the Commission compel testimony under a grant of immunity where it failed to comply with the statutory conditions precedent to such a grant.

a. Part II, Section 5-m of the Compact, exempts from process any person coming into New York from New Jer-

[2] Similarly, *Cohn* v. *Kramer*, 136 F. 2d 293, 295-6 (C. A. 6th, 1943) (civil contempt). *In re Rockhill*, 70 F. Supp. 1465.

[3] "[I]t is of great significance", said this Court, that "Congress expressly gave its consent to • • • implementing legislation not formally part of the compact"—which is described as "unique in the history of compacts" (*De Veau* v. *Braisted*, *supra*, p. 154).

sey, pursuant to a Commission subpoena, if the process is "in connection with matters which arose before his entrance into such state under the subpoena" (*infra*, p. 24).

The facts here are not in dispute. Petitioner came into New York on June 23, 1960, in response to the Commission's subpoena. He was served on June 23, 1960 with an order to show cause to adjudge him in contempt by reason of his testimony the prior day, June 22, 1960. Consequently, that service was in direct violation of Section 5-m. The opinion at Special Term held that petitioner had not entered New York on June 23 because he had previously entered it on June 17. The Court did not explain why petitioner "must be deemed" to have made a single entry; nor did it illuminate the "purposes of applying Section 5-m" which were aided by its conclusions (R. 84). The statutory language supports petitioner's position. There are no reported judicial decisions on the subject, and it is the only one which is factually correct. The two State appellate courts, not having written opinions, must be deemed to have agreed with the Special Term. This raises a federal question of the Compact's construction. Since the Commission is presently engaged in large scale investigations, and since bi-state agencies with similar statutes are increasingly active, the problem posed is likely to recur frequently and should not remain unresolved.

b. The second problem of statutory construction relates to the conditions precedent to the grant of immunity. Under Part II, Section 5-b of the compact, *infra*, pp. 23, 24, immunity can be granted upon notice to "the appropriate district attorney or prosecutor having an official interest therein". Petitioner pointed out at Special Term—without challenge—that by reason of the geographic location of the activities ascribed to him, the District Attorneys of Queens County, Nassau County and Suffolk County, among others, were entitled to and had not been given such notice (R.

166-167). The Commission merely argued that petitioner had immunity regardless of its compliance with the statutory conditions. While the Commission's inadequate notice may save for the witness "any immunity otherwise properly conferred on him", it is the witness's right to insist that he not be required to surrender his constitutional privilege until the Commission complies strictly with its statutory conditions: "Immunity shall not be conferred upon any person except in accordance with the provisions of this subdivision" (*infra*, p. 24).

3. The circumstances under which petitioner was compelled to appear in New York on June 23, 1961, at which time he was served with the process instituting contempt proceedings raise a substantial question of due process in addition to that of statutory construction already discussed (*supra*, pp. 11, 12). The purported purpose of the instruction on June 22nd to return pursuant to the subpoena (R. 21) was to appear "as a witness and to testify" (R. 21, 43). The hearing of June 23rd was a *pro forma* one intended to furnish a colorable basis for the June 22nd direction to return (R. 74-75). Hence, the direction and the subpoena which it implemented were examples of a "fraudulent pretense [whereby] a party is brought within the jurisdiction". *Carpenter* v. *Spooner*, 2 Sandf. 717 (1850). It is settled under New York law that where one is "enticed into this jurisdiction from another state by fraud and deceit • • • in order that he might be served with a summons and complaint", service so effected is invalid. *Neotex Mfg. Co.* v. *Eidinger*, 250 App. Div. 504, 505 (1st Dept., 1939); *Gampel* v. *Gampel*, 114 N. Y. S. 2d 474.

Whereas misrepresentation by a private party may constitute merely fraud, where practiced by a governmental agency it represents a denial of due process. A "court will not sanction, even inferentially, such abuse or degradation

of its process". *Jurisdiction by Trickery: Enticement for Service of Process*, 7 *Duke Law Journal* 52 (1957). See *Tickle* v. *Barton*, 142 W. Va. 188, 95 S. E. 2d 427, (1956); *Larned* v. *Griffin* (C. C.) 12 Fed. Rep. 590. The Commission engaged in what this Court has in a not unrelated context described as "an indefensible sort of entrapment". *Raley* v. *Ohio*, 360 U. S. 423, 426; *Cf. Sorrells* v. *United States*, 287 U. S. 435, 442. See generally *Berger* v. *United States*, 295 U. S. 78.

4. This case raises, for the first time, the sufficiency of a grant of immunity from state, in contradistinction to federal, prosecution where the investigating agency is, (i) created by interstate compact with congressional consent; (ii) its purpose and operations are instinct with vital federal interests and functions; and (iii) its investigation of petitioner was the result of collaboration with other federal agencies, concerned with the disclosure and prosecution of federal crimes.[4]

a. There is, therefore, presented to this Court the important question as to the nature of the compact creating the Waterfront Commission. Such an agency, this Court has said, "performs high functions in our federalism" and the "construction of a compact sanctioned by Congress • • • presents a Federal question" on which this Court must make the ultimate decision. *Petty* v. *Tennessee-Missouri Bridge Comm., supra*, at 278. See also Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L. J. 685, 694-695 (1925).

Moreover, "once compacts are approved and ratified and the agencies they create begin operations, direct rela-

---

[4] Petitioner's argument herein is contrary to that of petitioners in *De Veau* v. *Braisted*, 363 U. S. 144, and *Murphy* v. *Waterfront Commission*, Oct. Term 1961, No. 362, *cert. den.* 30 L. W. 3144, that the Commission is a state agency whose functions were preempted by other federal legislation.

tions between them and federal executive departments become common • • •." Leach, *The Federal Government and Interstate Compacts*, 29 Ford. L. Rev. 421, 431 (1961). They unite "the powers of the national government with those of a group of states through a single mechanism." Zimmerman and Wendell, *The Interstate Compact Since 1925* (p. 8).

A further significant aspect of the federal attributes of an interstate compact is that a state statute which conflicts with an interstate compact is invalid and unenforceable. *Green* v. *Biddle*, 8 *Wheat.* (21 U. S.) 1; *State* v. *Hoofman*, 9 Md. 28 (1856); *President, Managers C.* v. *Trenton City Bridge Co.*, 13 N. J. Eq. 46 (1860); *State* v. *Faudre*, 54 W. Va. 122, 146 S. E. 269 (1903). The federal aspect of the compact is shown further by Congressional ability to "provide, in certain cases, for enforcement of the terms of the compact by national agencies until a recalcitrant state enforced them." *The Interstate Compact Since 1925*, *supra*, at p. 56.

Upon this Court's construction of the compact, see *Petty* v. *Tennessee-Missouri Bridge Comm.*, *supra*, it will appear, we believe, that the Commission is at least quasi-federal in character, that it is investigating federal crime. *Cf. DiCarlo* v. *United States*, 102 F. Supp. 597 (N. D. Ohio, 1952). If so, its power to compel testimony in the face of danger of federal prosecution is no greater than that of a federal grand jury. See *Ullman* v. *United States*, 350 U. S. 422.

b. However, should the Court determine that this is a state agency totally without federal functions, it will then reach the issue left open in *Knapp* v. *Schweitzer*, namely, whether in a case of "collaboration between state and federal officers the defendant could successfully assert privilege in the state proceeding" (357 U. S. 371, 380). For here,

unlike the situation in *Knapp*, the Commission is being "used as an instrument of federal prosecution or investigation." (*supra* at 380).

Under these circumstances, the decision below is in principle in conflict with this Court's decisions in *Lustig* v. *United States*, 338 U. S. 74, and *Byars* v. *United States*, 273 U. S. 28. Since the Commission was in fact collaborating with federal agencies, the compulsion to testify here would violate petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment as well as the Fourteenth Amendment. In addition, it would constitute an unreasonable search and seizure which under the decisions would be a violation of the Fourteenth Amendment. See *Wolf* v. *Colorado*, 338 U. S. 25, 27, and *Elkins* v. *United States*, 364 U. S. 206.

The federal character of the Commission and its collaboration *in this case* with other federal agencies will permit a reversal of the orders below consistent with this Court's decisions in *Knapp* v. *Schweitzer*, 357 U. S. 371, *Feldman* v. *United States*, 322 U. S. 487 and *Mills* v. *Louisiana*, 360 U. S. 230. Nevertheless, if certiorari were granted without limitation, petitioner would seek reconsideration by the Court of the issues raised in those cases. Their public importance and the close division on the subject in this Court justifies a further analysis of the problem in the appealing context of this case. See Kroner, *Self-Incrimination: the External Reach of the Privilege*, 60 Col. L. Rev. 816 (1960).

This is particularly true since the Commission has now instituted contempt proceedings in New Jersey against other persons to whom it has proffered state, not federal, immunity. *In the Matter of the Application of the Waterfront Commission of New York Harbor to Punish John Moody, Sr. For Failure to Obey a Subpoena* (Superior Court of New Jersey, Law Division, Hudson County).

5. *a.* This case presents for the first time the application of the due process clause to investigations conducted under an interstate compact. The important question here is whether the requirements of due process, declared by this Court to be applicable to congressional committees, should not also be applicable to such agencies performing "high functions in our federalism." *Petty* v. *Tennessee-Missouri Bridge Comm.*, 359 U. S. 275 at 279.

Thus, the Waterfront Commission was required as a matter of due process to apprise petitioner at the time of his appearance of the subject matter of the inquiry and of the Commission's jurisdiction thereof (R. 23-43). *Watkins* v. *United States*, 354 U. S. 178, 214; *Sacher* v. *United States*, 356 U. S. 576, 578. See to the same effect, *Kilbourn* v. *Thompson*, 103 U. S. 168; *Matter of Barnes*, 204 N. Y. 108. These factors appear to be lacking in the instant case.

The Commission's own hearings are silent as to purpose, subject matter and the pertinency of the particular questions, see *Watkins* v. *United States*, 354 U. S. 178, 214. It was not until the contempt proceedings that it made even a generalized statement as to its purpose namely, "to determine the extent of criminal influences in the I. L. A., which represents all longshoremen and checkers in the Port of New York" (R. 15). This hardly established pertinency in view of the fact that petitioner had never been convicted of crime and that the Locals with which he was connected were not waterfront locals subject to the Commission's jurisdiction (R. 168). Not only did the Commission not seek to establish the pertinency of any particular question, but some of the questions on their face—those dealing with strikes in other industries—had nothing whatsoever to do with the waterfront (R. 6).

In the light of the direct challenge made by petitioner to such matters as jurisdiction, pertinency and luminosity

it was the duty of the Court at Special Term to make a determination of pertinency as to each of the questions which were the basis for indefinite commitment. Its failure to exercise that judicial function compounded the denial of due process.[5]

b. Assuming, *arguendo,* that the Commission was a purely state agency, there would still be presented the problems of compliance with the due process clause of the Fourteenth Amendment. This Court has three times in recent years vacated contempt convictions arising from state investigations where substantial claims of violation of due process were upheld. *Scull* v. *Virginia,* 359 U. S. 344; *Sweezy* v. *New Hampshire,* 354 U. S. 234; *Raley* v. *State of Ohio,* 360 U. S. 423. See also *Gibson* v. *Florida Legislative Investigation Committee,* No. 70, October Term 1961.

The instant case presents many of the defects causing reversal in the above cited cases. For example, if in *Scull,* "the purposes of the inquiry, as announced by the Chairman, were so unclear * * *," (359 U. S. 353), what should be said of the instant case where no purpose was stated to the witness? A state investigation conducted solely for publicity purposes is no more consistent with due process than a similarly intended federal one. A finding of pertinency is as necessary to due process in a state investigation as in a federal one.

While this case does not involve the issues of political association now before the Court in *Liveright* v. *United States,* No. 11, October Term 1961, and the related cases, it raises fundamental issues of due process which affect all governmental investigations.

---

[5] Even in *Uphaus* v. *Wyman,* 360 U. S. 72, the state courts passed upon the pertinency of the particular questions.

Conclusion

This case involves the interaction of two federal problems not previously presented to the Court: the construction of an interstate compact, and its use to deprive a citizen of his constitutional privilege against self-incrimination, his right to due process and his right to defend himself in a quasi-criminal proceeding. This confluence of important problems which may be expected to arise frequently in a period of increasing governmental investigation now calls for consideration by this Court.

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
Attorneys for Petitioner,
25 Broad Street,
New York 4, N. Y.

RABINOWITZ & BOUDIN,
ARTHUR SCHUTZER,
Of Counsel.

Dated, November 12, 1961.

APPENDIX A

The Constitutional Provisions and Statutes Involved

Constitution of the United States

Article 1, Section 10, Clause 3

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining

witnesses in his favor, and to have the Assistance of Counsel for his defence.

FOURTEENTH AMENDMENT:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE ACT OF AUGUST 12, 1953, C. 407, 67 STAT. 541

The consent of Congress is hereby given to the compact set forth below to all of its terms and provisions, and to the carrying out and effectuation of said compact, and enactments in furtherance thereof * * *.

THE WATERFRONT COMMISSION COMPACT

WATERFRONT COMMISSION ACT, PART I, MCKINNEY'S UNCONSOLIDATED LAWS, SECTION 9810 (FORMERLY 6700-dd).

In addition to the powers and duties elsewhere prescribed in this compact, the Commission shall have the powers:

* * *

8. By its members and its properly designated officers, agents and employees, to administer oaths and issue subpoenas throughout both states to compel the attendance of witnesses and the giving of testimony and the production of other evidence;

Appendix A

WATERFRONT COMMISSION ACT, PART I, MCKINNEY UNCONSOLIDATED LAWS, SECTION 9862
(FORMERLY 6700-nn)

* * *

1. The failure of any witness, when duly subpoenaed to attend, give testimony or produce other evidence, whether or not at a hearing, shall be punishable by the superior court in New Jersey and the supreme court in New York in the same manner as said failure is punishable by such court in a case therein pending.

WATERFRONT COMMISSION ACT, PART I, MCKINNEY'S UNCONSOLIDATED LAWS, SECTION 9810
(FORMERLY 6700-dd)

In addition to the powers and duties elsewhere prescribed in this compact, the commission shall have the power:

* * *

(11) To make investigations, collect and compile information concerning waterfront practices generally within the port of New York district and upon all matters relating to the accomplishment of the objectives of this compact;

(13) To make annual and other reports to the governors and legislatures of both states containing recommendations for the improvement of the conditions of waterfront labor within the port of New York district, for the alleviation of the evils described in article I and for the effectuation of the purposes of this compact. Such annual reports shall state the commission's finding and determination as to whether the public necessity still exists for (a) the continued registration of longshoremen, (b) the continued licensing of any occupation or employment required to be licensed hereunder and (c) the continued public operation of the employment information centers provided for in article XII;

Appendix A

WATERFRONT COMMISSION ACT, PART II, MCKINNEY UNCONSOLIDATED LAWS, SECTION 9906
(FORMERLY 6700-tt-2)
(SECTION 5-b OF THE COMPACT)

Additional powers of the commission.

In addition to the powers and duties elsewere described in this act, the commission shall have the following powers:

* * *

5. To confer immunity, in the following manner: In any investigation, interview or other proceeding conducted under oath by the commission or any duly authorized officer, employee or agent thereof, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made upon twenty-four hours' prior written notice to the appropriate attorney general of the state of New York or the state of New Jersey, and to the appropriate district attorney or prosecutor having an official interest therein, by the unanimous vote of both members of the commission or their designees appointed pursuant to the provisions of section three of article III of this act, that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this subdivision, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

"Immunity" as used in this subdivision means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by the unanimous vote of both members of the commission or their designees

appointed pursuant to the provisions of section three of article III of this act, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

Immunity shall not be conferred upon any person except in accordance with the provisions of this subdivision. If, after compliance with the provisions of this subdivision, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate attorney general or district attorney or prosecutor having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him.

WATERFRONT COMMISSION ACT, PART II, McKINNEY UNCONSOLIDATED LAWS, SECTION 9917
(FORMERLY 6700-tt-13)
(SECTION 5-m OF THE COMPACT)

Exemption from arrest and service of process:

If a person, in obedience to a subpoena, issued pursuant to article four or article eleven of the compact directing him to attend and testify, comes into either state party to this compact from the other state, he shall not, while in that state pursuant to such subpoena, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into such state under the subpoena.

APPENDIX B

Further Statement of Manner in Which Federal Questions Sought to Be Reviewed Were Raised

1. *Cross-Notice of Motion to Vacate Service:*

(a) The said respondent was exempt from service of the said order to show cause by reason of the provisions of the Waterfront Commission Act, Part II, Section 5-m, McKinney Unconsolidated Laws, Section 6700-11-13; and

(b) The said respondent was enticed by the applicant, Waterfront Commission of New York Harbor, into the State of New York for the purpose of service of the said order to show cause; and for such other and further relief as to this Court may seem just and proper (R.68-69).

2. *Motion for Deposition and Discovery.*

The Order to Show Cause sought deposition and discovery with respect to the following matters:

1. The subject matter of the investigation and whether it was within the Commission's jurisdiction.

2. The Commission's purpose in subpoenaing respondent.

3. The Commission's compliance with the statutory conditions precedent to the grant of immunity.

4. The nature of the Commission as a federal instrumentality by reason of its functions and activities.

5. The Commission's collaboration with agents of the United States Government in the investigation of respondent and of the International Longshoremen's Association and locals thereof, and in the

issuance of a subpoena to him, the service of process upon him and the purported grant of immunity to him.

6. The pertinency of the particular questions put to respondent to the subject matter of the investigation and whether the Commission made clear to respondent the said subject matter and pertinency at the time of the alleged contempt.

7. The Commission's purpose in directing your deponent on June 22, 1960 to return for the alleged purpose of examining him further on June 23, 1960 and the Commission's deceit and misrepresentation in this respect (R. 88-89).

3. *Affidavit in Support of Motion for Deposition and Discovery*:

6. • • • It is and was your deponent's belief that the purpose of conducting a public session June 22, 1960 was therefore an improper one and solely for the purpose of exposing your deponent and violating his right of privacy (R. 93).

• • •

11. Your deponent will also take the position that under the United States Constitution and as applied to the facts in this case, notice was required to be given to the federal prosecuting officials and that in the absence of a grant of immunity by them, the Commission could not compel your deponent's testimony. The reasons for this contention are the following:

(a) Your deponent submits, upon information and belief, that the subpoenas issued to him were the result of collaboration between the Commission and the representatives of the Justice Department,

National Labor Relations Board, and other federal agencies. Such collaboration with federal officials is contemplated by the Waterfront Commission Act and is referred to in annual reports of the Commission.

(b) Upon information and belief the whereabouts of your petitioner for the purposes of the service of process were the result of reports by agents of the Federal Bureau of Investigation to the Commission.

(c) Upon information and belief the Commission is in fact a federal instrumentality and is engaged in a number of functions on behalf of the United States Government and receives federal funds (R. 96-97).

4. *Affidavit in Opposition to Motion to Adjudge in Contempt*:

It is thus presently impossible for me to make a full factual presentation in defense of my position in these proceedings, for, as the affidavits indicate, much of this evidence is within the sole control and possession of the Commission and possibly of other government agencies, and much of it is in documentary form. Certain of these records and papers have been requested of the Commission, as appears from my affidavit of July 26, 1960 in support of the then pending motion to take the Commission's deposition. The said affidavit and the exhibits annexed thereto are incorporated herein with the same force and effect as though specifically set forth herein. I respectfully submit that to compel me to proceed under these circumstances constitutes a denial of due process.

First, I respectfully submit that the Court is without jurisdiction over my person because I was exempt from service of the order to show cause instituting

this proceeding under the Waterfront Commission Act, Part II, Section 5-m, McKinney's Unconsolidated Laws, Section 5700-tt-13 • • • (R. 163-164).

• • •

Secondly, the Commission seeks to compel my testimony notwithstanding my claim of my constitutional privilege against self-incrimination • • • (R. 164).

• • •

The Waterfront Commission is engaged, according to its annual reports, in active collaboration with federal agencies. Accusations of the Waterfront Commission in this case as well as in a series of other cases in New York and in New Jersey included, upon information and belief, a wide variety of federal crimes in the area of labor relations. The Waterfront Commission is the result of said legislation approved by the Congress of the United States. It is specifically provided in the Waterfront Commission Act that in certain respects it fulfills functions as an agency of the United States Government. I am advised by counsel and believe that under these circumstances immunity against federal prosecution is a prerequisite to compulsion of testimony.

Fourthly, the Commission's papers do not show that it has jurisdiction over the subject matter of this investigation (R. 167-168).

• • •

Fifthly, your deponent respectfully submits that the Commission's purpose in subpoenaing your deponent was not the bona fide one of carrying out the purposes of the Waterfront Commission Act • • • (R. 169).

APPENDIX C

Opinion at Special Term

Application to punish the respondent as and for a contempt, for refusal to testify on June 22, 1960, pursuant to a duly served subpoena of the commission is granted. The objections raised by the respondent are overruled as not being available under the circumstances or as having been disposed of by previous and controlling court precedents. Settle order.

APPENDIX D

1. Order of Court of Appeals

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Fifth day of October A. D. 1961.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

Mo. No. 453

In the Matter of

the Application of the WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent,

For an Order Directing Punishment of ANTHONY MARCHITTO,

Appellant,

For Contempt &c.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from the contempt order, be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from the order denying appellant the right to discovery, be and the same hereby is dismissed.

A copy

GEARON KIMBALL,
Deputy Clerk.

(Seal)

2. Order of Supreme Court, New York County, Special Term

At a Special Term of the Supreme Court, Part 1 thereof, held in and for the County of New York at the Court House thereof, in the Borough of Manhattan, City, County and State of New York, on the 20th day of March, 1961.

Present:

HON. OWEN McGIVERN,
Justice.

[SAME TITLE]

A motion having duly come on by order to show cause before this Court on the 10th day of October, 1960, for an order to punish Anthony Marchitto as and for a contempt of Court pursuant to provisions of Section 1 of Article XIV of the Waterfront Commission Compact for failure to testify before the Waterfront Commission of New York Harbor, pursuant to a subpoena duly issued by the Water-

front Commission of New York Harbor and duly served on Anthony Marchitto, together with such other and further relief as may be just and proper,

Now, upon reading and filing said order to show cause dated June 23, 1960, signed by Mr. Justice Morris E. Spector, and the affidavit of William P. Sirignano, Esq., sworn to June 23, 1960, and the exhibits annexed thereto, to wit, the affidavit of service of the aforesaid subpoena by Gerald V. Clarke, sworn to June 10, 1960, the copy of the aforesaid subpoena annexed thereto, a copy of the resolution of the Waterfront Commission authorizing public hearings, certified on June 15, 1960 by George A. Merrill, Jr., Secretary of the Waterfront Commission of New York Harbor, and the transcript of the testimony of Anthony Marchitto before the Waterfront Commission on June 22, 1960, and Exhibits 56A-56H annexed to said transcript, and the additional affidavit of William P. Sirignano, Esq., sworn to August 10, 1960, all in support of said application of the Waterfront Commission of New York Harbor to punish Anthony Marchitto as for a contempt of Court, and due proof of service thereof, and the affidavit of Anthony Marchitto, sworn to August 19, 1960, and the exhibits annexed thereto, to wit, the copy of said Anthony Marchitto's notice of motion to set aside the service herein, a copy of said Anthony Marchitto's notice to admit facts, and a copy of the Waterfront Commission's reply to notice to admit facts, in opposition thereto, and after hearing Irving Malchman, Esq., Assistant Counsel of the Waterfront Commission of New York Harbor, in support thereof, and Leonard B. Boudin, Esq., attorney for said Anthony Marchitto, in opposition thereto, and due deliberation having been had, and the decision of the Court filed herein,

Now, on m tion of William P. Sirignano, Esq., general counsel and attorney for the Waterfront Commission of New York Harbor, it is

Appendix D

ORDERED, that said Anthony Marchitto is hereby adjudged guilty of contempt of Court for his contumacious, wilful and unlawful refusal to answer certain questions before the Waterfront Commission of New York Harbor as required by the aforesaid subpoena of the Waterfront Commission of New York Harbor dated June 9, 1960, to wit:

1. Q. "What is your present occupation, Mr. Marchitto?"

2. Q. "Mr. Marchitto, were you ever an officer or a trustee of Local 1478?"

3. Q. "Do you know Frank Campbell?"

4. Q. "Were you associated with Frank Campbell in connection with Local 1478?"

5. Q. "Are you an officer of Local 1823?"

6. Q. "Do you know Joe 'Heels' Murphy?"

7. Q. "Were you associated with Joe 'Heels' Murphy in the running of Local 1823, ILA?"

8. Q. "Did you engage in strike-breaking activities with Frank Campbell and Joe 'Heels' Murphy in 1959 during the Bloomingdale strike?"

9. Q. "Did you engage in strike-breaking activities in connection with Whelan's Drug Store strike in 1959?"

10. Q. "Did you have access to the books of Locals 1478 and 1823 prior to October, 1958?"

11. Q. "Did you have access to the funds of Locals 1478 and 1823?"

12. Q. "Do you know Fred Baron,"

and it is further

ORDERED, that the said refusal of said Anthony Marchitto to answer the aforesaid questions was calculated to and actually did defeat, impede, impair and prejudice the rights and remedies of the Waterfront Commission of New York Harbor herein, and it is further

ORDERED, that said Anthony Marchitto for his misconduct shall be fined the sum of two hundred and fifty dollars ($250) to be collected and paid over to the Waterfront Commission of New York Harbor, and it is further

ORDERED, that said Anthony Marchitto is hereby directed to appear and attend forthwith at the offices of the Waterfront Commission of New York Harbor at 15 Park Row, New York, New York, and to submit to examination by the members of the Waterfront Commission, or their designees appointed pursuant to the provisions of section three of article III of the Waterfront Commission Act, upon the aforesaid questions; and it is further

ORDERED, that the Sheriff of any County to whom a certified copy of this order shall be delivered, shall forthwith on receipt thereof, and without further process, take the body of said Anthony Marchitto, and forthwith, commit and imprison him in the jail of said County where he shall remain until he shall have answered the aforesaid questions and until he shall have paid fines as aforesaid, or until he is discharged according to law.

O. McG.,
J. S. C.

Filed: March 20, 1961.
N. Y. Co. Clerk's Office.

Office-Supreme Court, U.S.
FILED
DEC 14 1961
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1961

No. 550

ANTHONY MARCHITTO,
Petitioner,

v.

WATERFRONT COMMISSION OF NEW YORK HARBOR,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM P. SIRIGNANO,
General Counsel of the Waterfront Commission of New York Harbor,
Attorney for Appellee,
15 Park Row,
New York 38, N. Y.

Of Counsel:

IRVING MALCHMAN,
Assistant to the General Counsel.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement	4
Argument	6
I. Petitioner's contention that he was denied pre-trial discovery and a hearing in violation of due process was not properly raised in the courts below and in any event is without merit	6
A. Petitioner's Motion for Pre-Trial Discovery	7
B. The Alleged Denial of a Hearing	11
C. Petitioner's Notice to Admit	15
II. Petitioner's contention that under the Waterfront Commission Act he was immune from service of process and further that he was fraudulently enticed into New York by the Commission was not properly raised in the courts below and in any event is without merit	16
III. Petitioner's contention that he was not apprised of the subject matter of the investigation was never asserted before the Commission and in any event is without merit	19
IV. Petitioner's contention that the Commission failed to give the required statutory notice to all the prosecutors with an official interest therein of its intention to grant petitioner immunity from prosecution was never asserted before the Commission and in any event is without merit	21

PAGE

V. Petitioner had no constitutional right to refuse to testify upon the ground that he had not been granted immunity from federal prosecution 23

Conclusion 25

Appendix A—Excerpt From Petitioner's Brief in Appellate Division 26

Appendix B—Excerpt From Petitioner's Brief in Special Term 27

Cases:

Barenblatt v. *United States*, 360 U. S. 109 .....19, 21

Bata v. *Bata*, 282 App. Div. 862, 124 N.Y.S. 2d 722 (1st Dept. 1953) 11

C.I.O. v. *McAdory*, 325 U. S. 472 .....11, 16

Commission of Investigation v. *Lombardozzi*, 7 A. D. 2d 48, 180 N.Y.S. 2d 496 (1st Dept. 1958), aff'd. 5 N. Y. 2d 1026, 6 N. Y. 2d 744, *cert. den.*, 360 U. S. 930 21

Commissioner v. *Shamberg's Estate*, 144 F. 2d 998 (2nd Cir. 1944), *cert. den.* 323 U. S. 792 25

DeVeau v. *Braisted*, 363 U. S. 144 25

Frank v. *Rowland & Shafto*, 169 App. Div. 918, 153 N.Y.S. 926 (1st Dept. 1915) 9

Hinderlider v. *LaPlata River Co.*, 304 U. S. 92 25

In the Matter of the Application of the Waterfront Commission of New York Harbor, 39 N. J. Super. 33 (1956) 17

In the Matter of the Application of the Waterfront Commission of New York Harbor (Anthony Marchitto), 32 N. J. 323 (1960) 4, 14, 20

PAGE

In re Flanagan's Will, 271 App. Div. 1014, 68 N.Y.S. 2d 248 (2nd Dept. 1947) 9

Jefferson Title & Mortgage Corp. v. *Blue Spruce Realty Corp.*, 263 App. Div. 963, 33 N.Y.S. 2d 28 (2nd Dept. 1942) 9

Knapp v. *Schweitzer*, 357 U. S. 371 ..... 23, 24

Lamb v. *Schmitt*, 285 U. S. 222 17

Mills v. *State of Louisiana*, 360 U. S. 230 24

O'Connor Long Island Properties Corp. v. *Brackman*, 288 N. Y. 23 9

Oklahoma Press Publishing Co. v. *Walling*, 327 U. S. 186 14

Parker v. *Illinois*, 333 U. S. 571 ..... 11, 16

Rowland v. *State*, 172 N.Y.S. 2d 420 (Ct. Cl., 1957) .. 15

Stembridge v. *Georgia*, 343 U. S. 541 11

Watkins v. *United States*, 354 U. S. 178 20

CONSTITUTION AND STATUTES:

Act of August 12, 1953, c. 407, 67 Stat. 541 24

New Jersey Laws 1956, c. 194 23

New Jersey Laws 1956, c. 19 17

New York Civil Practice Act, Section 580 ..... 8, 9, 16

New York Laws 1956, c. 457 17

New York Laws 1957, c. 188 23

New York Laws 1961, c. 211 6

New York Penal Law, Section 2447 23

28 U.S.C. Section 1257(3) 2

PAGE

United States Constitution, Fifth Amendment 24

Waterfront Commission Act 2

Article IV (McK. Unconsol. Laws 9810) 17

Section 5-b(5) (McK. Unconsol. Laws 9906) ..5, 21, 23

Section 5-m (McK. Unconsol. Laws 9917) 16, 17

MISCELLANEOUS:

McKinney's 1957 Session Laws of New York (Legislative Memorandum of Waterfront Commission), page 2053 23

Supreme Court of the United States

OCTOBER TERM, 1961

No. 550

ANTHONY MARCHITTO,

Petitioner.

v.

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

Since the Court of Appeals of the State of New York first dismissed petitioner's appeal upon the ground that no substantial constitutional question was directly involved in such appeal and then denied petitioner's subsequent motion for leave to appeal, the Court of Appeals did not render an opinion herein. And since the Appellate Division, First Department, of the State of New York, unanimously affirmed without opinion the various orders of the Supreme Court of the State of New York (hereinafter referred to as "Special Term") involved herein, the Appellate Division also did not render an opinion.

The opinion of Special Term adjudicating petitioner guilty of civil contempt is printed in the Appendix to the petition herein at page 29. The opinions of Special Term denying petitioner's motion to set aside the service herein and denying another motion by petitioner for discovery and an examination before trial are printed, respectively, at pages 83 and 140 of the record herein.

Jurisdiction

Petitioner invokes the jurisdiction of this Court under Title 28 U.S.C., Section 1257(3).

Questions Presented

1. Whether petitioner was denied due process allegedly because he was denied not only pretrial discovery and examination but also a hearing and was adjudicated in contempt solely upon affidavits where (a) petitioner's appeal from the denial of pretrial discovery and examination was not properly taken, (b) petitioner did not properly raise the alleged denial of a hearing in the courts below, (c) petitioner's request for a hearing, if any, was narrowly limited to the Commission's stated reasons for requiring petitioner's testimony, and (d) the instant contempt proceeding did not present any triable issues of fact.

2. Whether petitioner was immune from service of process under the Waterfront Commission Act and, further, was denied due process because his entry into the State of New York was allegedly enticed by the Commission's fraud and misrepresentation where (a) petitioner's appeal from the denial of his motion to set aside service was not properly taken, (b) petitioner was served with contempt papers in aid of the very matter for which his presence was required in New York in the first instance, the intendment of the statutory immunity being to grant an exemption from process only in an unrelated matter, and (c) the Commission continued its subpoena in force for the explicit purpose of bringing petitioner before a court to answer for his contumacious conduct and the Commission gave petitioner upon his return to New York an opportunity to change his mind and to testify, which petitioner refused to do.

3. Whether petitioner was denied due process allegedly because he was never apprised of the subject matter of the investigation where (a) petitioner never asserted this objection before the Commission, (b) the subject matter of the investigation was made unequivocally clear in a prior contempt proceeding by the Commission against petitioner in New Jersey and petitioner was otherwise apprised of the subject matter of the investigation, and (c) petitioner has been adjudicated guilty only of a *civil* contempt.

4. Whether petitioner's contention that the Commission allegedly failed to give the required statutory notice to all the prosecutors with an official interest therein of its intention to grant petitioner immunity from prosecution is meritorious where (a) petitioner never asserted this objection before the Commission and (b) the immunity statute specifically provides that a witness shall have immunity from prosecution even if there is a failure to so notify the prosecutors.

5. Whether petitioner, after being granted immunity from state prosecution by the Commission, had a constitutional right to refuse to testify because he had not been granted immunity from federal prosecution, upon the ground that, according to petitioner's conclusory allegations, not supported by any facts whatever in the record, there was cooperation between the Commission and federal agencies and upon the further ground that the Commission was created by an interstate compact to which Congress had given its consent.

Constitutional Provisions and Statutes Involved

The various constitutional and statutory provisions involved herein are set forth in the Appendix to the petition at pages 20-24 and accordingly no purpose would be served in repeating them here.

Statement

This is a petition for certiorari to review an order of the Court of Appeals of the State of New York denying petitioner's motion for leave to appeal from an order of the Appellate Division unanimously affirming without opinion an order of Special Term which adjudged petitioner guilty of civil contempt and which ordered that petitioner be fined $250 and that he be incarcerated until he answers certain questions pursuant to a subpoena of the Waterfront Commission and pays said fine.

The facts are as follows. In the course of a preliminary investigation prior to its public hearing in June, 1960, the Waterfront Commission received information that charters had been granted by the International Longshoremen's Association (the union that represents all longshoremen and other waterfront workers in the port of New York district) to certain notorious hoodlums and criminals for Local 1823 to organize white collar workers in industrial plants in New Jersey and Pennsylvania and also for Local 1478 to organize marine warehousemen in certain warehouses in the port of New York district (R. 16-17, 109-110). As part of its preliminary investigation into criminal influence in the ILA, the Commission on July 1, 1959 served a subpoena on petitioner, a resident of Jersey City, New Jersey (R. 23), requiring him to testify at the Commission's offices in New York City (R. 109). However, petitioner refused, upon various grounds, to be sworn and to testify and accordingly the Commission instituted contempt proceedings against petitioner in the courts of New Jersey, which adjudged petitioner guilty of civil contempt. *In the Matter of the Waterfront Commission of New York Harbor (Anthony Marchitto)*, 32 N. J. 323 (1960) (R. 117-135). Upon remand from the Supreme Court of New Jersey, petitioner invoked for the first time his privilege against self-

incrimination and therefore the judgment of civil contempt against petitioner was vacated on June 3, 1960 (R. 111).

In the meanwhile, as a result of information obtained during the course of its preliminary investigation into criminal influence in the ILA, the Commission, by resolution adopted June 2, 1960, determined that it would be in the public interest to hold public hearings with a view to determining, among other things, whether the Commission should make legislative recommendations to the Governors and Legislatures of New York and New Jersey (R. 114). These public hearings commenced on June 16, 1960 in New York City (R. 114). Petitioner, while at the offices of the Commission in New York City on June 10, 1960 in connection with its aforesaid preliminary investigation, was served with the within subpoena requiring his testimony at the Commission's public hearings (R. 21-22, 114).

On June 22, 1960, the duly adjourned return date of the within subpoena, petitioner appeared at the Commission's public hearings in New York City (R. 17). Petitioner refused to answer certain questions on the ground that his answers would tend to incriminate him (R. 17). Pursuant to the provisions of Section 5-b(5) of the Waterfront Commission Act (McK. Unconsol. Laws 9906) (Pet., pp. 23-24), the Commission granted petitioner immunity from prosecution and directed him to answer the questions (R. 17, 33-42). Petitioner persisted in his refusal to testify upon the grounds: (1) that the written notice of the Commission's intention to grant immunity to petitioner given by the Commission to the Attorney Generals of New York and New Jersey and to various district attorneys set forth only the subject matter upon which petitioner was to be questioned, and not the specific questions, themselves, and (2) that he (petitioner) had not been given immunity from federal prosecution (R. 17, 34-37).

In view of appellant's refusal to testify, notwithstanding the grant of immunity from prosecution, the Commission

instituted the instant contempt proceeding. Petitioner asserted in the courts below the same two grounds which were asserted by him at the Commission's public hearings for his refusal to testify. In addition, however, after the instant contempt proceeding was instituted, petitioner also asserted a multiplicity of other grounds for his refusal to testify.

Upon the conclusion of its public hearings, the Commission issued a Special Report to the Governors and Legislatures of the States of New York and New Jersey in December, 1960. In this Report, the Commission reported that the present law was being circumvented by criminal elements and recommended new legislation to strengthen the Waterfront Commission Act. These legislative recommendations have been enacted in New York (1961 Laws of New York, c. 211) and are presently pending in the New Jersey Legislature.

ARGUMENT

POINT I

Petitioner's contention that he was denied pre-trial discovery and a hearing in violation of due process was not properly raised in the Courts below and in any event is without merit.

Petitioner contends that he required discovery and an examination before trial in order to prove certain defenses to the within contempt proceeding (e.g., lack of a *bona fide* investigative purpose; Commission's failure to apprise him of the subject matter of the investigation, etc.) and that accordingly his motion therefor was improperly denied (pet., p. 6); that, in fact, petitioner's allegations respecting these defenses were legally admitted by the Commission's failure to contest his Notice To Admit (pet., pp. 6-7); and

that, as the capstone, petitioner's specific request for hearing was denied by Special Term which held him in contempt upon nothing but contested affidavits (pet., pp. 7-8). Hence, petitioner's first asserted reason for granting certiorari is that "although all of petitioner's contentions are deemed admitted . . . he was denied the opportunity to buttress his case by a deposition or discovery, his demand for hearing was rejected, and he was adjudged in contempt on the basis of affidavits whose allegations he contested" (pet., p. 9), all in claimed violation of due process.

Petitioner's due process argument may be best answered by considering *seriatim* the various contentions subsumed thereunder, that is, the denial of petitioner's motion for discovery, the alleged denial of a hearing, and petitioner's Notice To Admit.

A. Petitioner's Motion for Pre-Trial Discovery.

As was noted by Special Term, petitioner's application for pre-trial examination and discovery was exceedingly broad (R. 140-41):

> ". . . Marchitto [petitioner] has now moved for an order for examination before trial, pursuant to sections 292-a, 296, 308, and 324 of the Civil Practice Act, directing that the Waterfront Commission appear for such examination by its stated members, its executive director, its general counsel, and its agents and employees 'who participated in the examinations and investigations and service of process upon the respondent.' The subject matter upon which Marchitto seeks to examine the Waterfront Commission is exceedingly extensive. Without repetition of the matters stated in the order to show cause, it may be stated concisely that the subject matter of his inquiry pertains to matters which involve the subject matter of the Commission's investigation, its jurisdiction, its purpose in subpoenaing him, the Commission's compliance with statutory conditions precedent to granting of in-

munity to witnesses, the nature of the Commission as a federal instrumentality and matters relating to the pertinency and purpose of the Commission's investigation and questions put to Marchitto upon his examination before the Waterfront Commission. Moreover, he seeks a practically unlimited discovery and inspection of the transcripts of hearings and investigations conducted before the Commission at which the respondent appeared; all testimony taken by the Commission and its agents in executive and public sessions relating to him; all reports and memoranda reflecting collaboration with federal agencies and reports made to the governors and legislatures of New York and New Jersey, including those reports in preparation for the next legislative sessions. This is only part of the discovery and inspection sought."

Special Term denied petitioner's application for pre-trial examination and discovery upon the ground, among others, that "It is obvious from the nature of the information sought by Marchitto [petitioner] that he wishes the Commission to reveal not only information obtained by it in investigation as a law enforcement agency but also its mental processes in making its investigatory decisions" (R. 145).

1. While petitioner filed a notice of appeal from Special Term's order denying his motion for pre-trial examination and discovery, this appeal was never perfected. Rather, petitioner sought to review such order upon his appeal from the final contempt order. However, the discovery order was, of course, an intermediate order and, under the explicit provisions of section 580 of the New York Civil Practice Act, an appeal from a final judgment or order brings up for review an intermediate order "which is specified in the notice of appeal and necessarily affects the final judgment or order". Since petitioner's notice of appeal to the Appellate Division from the contempt

order did not specify the order denying his motion for pre-trial examination and discovery (R. 2-3), under New York practice the discovery order was not reviewable upon the appeal from the final contempt order. *O'Connor Long Island Properties Corp.* v. *Brackman*, 288 N. Y. 23; *In re Flanagan's Will*, 271 App. Div. 1014, 68 N.Y.S. 2d 248 (2nd Dept. 1947).

After the Commission filed its brief in the Appellate Division pointing out that petitioner had not properly brought up for review the order denying his discovery motion, petitioner unsuccessfully attempted several times to cure his error. First, petitioner moved in the Appellate Division to consolidate his unperfected appeal from the discovery order with his appeal from the contempt order. The Commission resisted this motion upon the ground that the pre-trial order was no longer extant since, as an intermediate order, it was merged into the final contempt order, that a separate appeal from an intermediate order could not be had once a final order or judgment was entered, *Jefferson Title & Mortgage Corp.* v. *Blue Spruce Realty Corp.*, 263 App. Div. 963, 33 N.Y.S. 2d 28 (2nd Sept. 1942); *Frank* v. *Rowland & Shafto*, 169 App. Div. 918, 153 N.Y.S. 926 (1st Dept., 1915), and that, rather, the provisions of Section 580 of the Civil Practice Act governed appeals once a final judgment or order was entered, which Section could not be circumvented in the manner attempted by petitioner. By order dated May 4, 1961, the Appellate Division affirmed the order of Special Term denying discovery and by an additional order dated May 9, 1961 the Appellate Division denied petitioner's motion to consolidate his appeal from the discovery order with his appeal from the contempt order upon the ground of mootness. Also by order dated May 4, 1961, the Appellate Division affirmed the order of Special Term adjudicating petitioner in civil contempt.

Thereafter, petitioner appealed as of right from the contempt order to the Court of Appeals upon purported constitutional grounds, stating in his notice of appeal that he

was also bringing up for review the order denying discovery. Petitioner also moved in the Appellate Division for leave to appeal to the Court of Appeals from the order denying discovery upon the ground that the constitutional aspects of such order were already before the Court of Appeals in his appeal taken as of right and that the non-constitutional aspects of the order presented important questions of law.

The Commission countered with a motion in the Court of Appeals to dismiss petitioner's appeal upon the ground that no substantial constitutional questions were involved. In its motion, the Commission specifically pointed out that no proper appeal had been taken by petitioner from the discovery order.

By order dated June 6, 1961, the Appellate Division denied petitioner's motion for leave to appeal to the Court of Appeals from the order denying discovery. And by order dated June 9, 1961, the Court of Appeals dismissed petitioner's appeal upon the ground that no substantial constitutional question was involved.

Finally, petitioner moved in the Court of Appeals for leave to appeal from the orders of the Appellate Division affirming Special Term's contempt and discovery orders. In its brief in opposition, the Commission again pointed out that no proper appeal had been taken by petitioner from the order denying discovery. By order dated October 5, 1961, the Court of Appeals denied petitioner's motion insofar as it sought leave to appeal from the contempt order and, in contradistinction, *dismissed* (not denied) the motion insofar as it sought leave to appeal from the discovery order (pet., pp. 30-31).

From the foregoing, it is evident that the Court of Appeals probably (and at the very least may have) dismissed petitioner's motion for leave to appeal insofar as it related to the discovery order upon the ground that no proper appeal had been taken therefrom under New York practice.

The failure to follow the prescribed procedure for obtaining appellate review in the state courts precludes, of course, review by this Court. E.g., *Parker* v. *Illinois*, 333 U. S. 571; *C.I.O.* v. *McAdory*, 325 U. S. 472, 477. And see *Stembridge* v. *Georgia*, 343 U. S. 541, 547-8, where this Court stated that it was without jurisdiction "when the question of the existence of an adequate state ground [for the decision] is debatable."

2. In any event, due process does not of course require *pre-trial* proceedings of any nature. And needless to say, under New York law a full trial-type hearing, where appropriate, may be had in a contempt proceeding. *Bata* v. *Bata*, 282 App. Div. 862, 124 N.Y.S. 2d 722 (1st Dept. 1953). Here, not only was a hearing inappropriate but no proper request therefor was made by petitioner.

B. The Alleged Denial of a Hearing.

1. First, petitioner did not argue before the Appellate Division, as he does here, that he was denied a hearing that he specifically requested. Rather, what petitioner did argue was that since (according to him) contempt proceedings of the instant kind were frequently determined upon affidavits, he was constitutionally entitled to a deposition as compulsory process for the purpose of obtaining witnesses in his favor. (See Appendix A hereto where there is set forth petitioner's entire argument on this point in his brief before the Appellate Division.) This is, of course, an entirely distinct argument. Not until the Commission pointed out in its brief in the Appellate Division that no proper appeal had been taken by petitioner from the order denying discovery did petitioner contend upon appeal, and then only in the Court of Appeals, that he had been unconstitutionally denied a hearing specifically requested by him. Of course, petitioner's failure to assert this objection in a timely fashion in the Appellate Division precludes review by this Court. E.g., *Parker* v. *Illinois*, *supra*; *C.I.O.* v. *McAdory*, *supra*.

Further, the fact is that petitioner in his brief before Special Term did not request Special Term to hold a hearing upon the issues presented by the within contempt proceeding. Rather, petitioner contended, as he did in the Appellate Division, that the denial of pre-trial discovery constituted a denial of compulsory process for obtaining witnesses in his favor and merely stated that he was specifically reserving his position upon this point should an appeal become necessary. (See Appendix B hereto where there is set forth petitioner's entire argument upon this point in his brief before Special Term.)

It is true that petitioner in his affidavit in opposition to the Commission's application to punish him for contempt did state that he was entitled to a hearing upon the allegations in the Commission's moving affidavit relating to the reasons for requiring petitioner's testimony (R. 171). This statement, consisting of two paragraphs, was buried in a myriad of other objections in petitioner's affidavit which incorporates by reference additional affidavits by petitioner and which, itself, occupies over fourteen printed pages in the record herein (R. 163-177). Moreover, we are sure that counsel for petitioner will agree that a transcript of the proceedings before Special Term would show that the Commission's contempt motion was submitted upon the papers with the affirmative and explicit consent of both the Commission and petitioner without any request for a hearing whatsoever.

2. Further, as noted, petitioner's reference to a hearing in his voluminous affidavit in opposition was concerned only with the Commission's stated purposes in requiring petitioner's testimony at its public hearings. Petitioner's statement on this matter in his affidavit is only partially quoted in the petition herein (p. 7); we set forth below, in the interest of accuracy, the entire statement (R. 171):

> "Finally, your deponent challenges as inaccurate the various statements made in the affidavit of William P.

Sirignano dated June 23, 1960, insofar as they relate to the purpose of the Commission's hearing, allege the existence of certain 'information' and purport to justify the putting of the particular questions. Under these circumstances, it is respectfully submitted that if the Commission's motion is not to be denied for inadequacy on its face, a decision should not be made upon the basis of an affidavit, particularly of a generalized and inadequate form presented by the Commission, but should be supported by testimony of witnesses subject to cross-examination by your deponent's counsel, with the additional protection of the granting of the motion to take the depositions and to have a discovery and inspection.

"For while your deponent does not concede the accuracy of any of the allegations made, obviously upon information and belief, in Mr. Sirignano's affidavit, it is impossible and would be improper to engage in a categorical denial of every statement until your deponent has had an opportunity to examine the witnesses offered in support of such allegations."

What the Commission said in its moving papers herein was that it had information that charters for two union locals had been granted by the ILA to certain notorious hoodlums and criminals, that petitioner was a trustee of such locals, and that consequently petitioner's testimony was desired at the Commission's public hearings on criminal influence in the ILA (R. 16-17). Accordingly, petitioner's reference in his affidavit in opposition to a hearing was limited to the Commission's stated purposes in requiring petitioner's testimony, and to no other issue. This identical contention (that is, a hearing should be held upon the Commission's stated purposes for requiring petitioner's testimony), was made by petitioner in the Commission's first contempt proceeding against him in the courts of New Jersey and was explicitly rejected by the Supreme

Court of New Jersey. *In the Matter of the Application of Waterfront Commission of New York Harbor (Anthony Marchitto)*, *supra*, at page 334, wherein it was cogently stated:

> "The appellant argues that the conclusions as to the Commission's jurisdiction that the trial judge made are constitutionally permissible only after a 'full hearing,' with the right of cross-examination preserved to the appellant.
>
> "It is unclear what issues the appellant feels must be fully tried. If the Commission's information as to the appellant's activities and their connection with the waterfront must be tried for reliability or veracity, then the entire range of the Commission's investigation would be covered by a threshold inquiry into jurisdiction. If the issue to be tried is whether the Commission actually has the information it claims to have, then the whole preliminary investigative process would be subject to scrutiny in advance of any investigation. If either of these issues had to be fully tried in court on the question of the Commission's jurisdiction to proceed, the orderly discharge of the Commission's duty of investigation would be intolerably impaired."

To the same effect, see *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 213, 215-17 (judicial hearing for purpose of determining whether or not there existed a subject matter for investigation is inappropriate).

3. In any event, the within contempt proceeding presents only issues of law, and not any issues of triable fact. See, *infra*, Point II (petitioner's contention respecting the service of process herein), Point III (petitioner's contention that he was not sufficiently apprised as to the purposes of the Commission's investigation), Point IV

(petitioner's contention that the Commission failed to give the required statutory notice in granting him immunity from prosecution), and Point V (petitioner's contention that he was entitled to immunity from federal prosecution).

C. Petitioner's Notice to Admit.

1. Petitioner's contention that the Commission failed to contest his Notice To Admit does not of course constitute an independent reason for granting certiorari. Rather, this is simply a makeweight in support of petitioner's contention that he was unconstitutionally denied both pretrial discovery and a hearing and falls therewith.

2. Further petitioner omits entirely to refer to the fact that the Commission did file a reply to petitioner's Notice To Admit in which the Commission set forth its legal reasons for its refusal either to admit or deny the matters in petitioner's Notice (R. 162). Since under New York law a motion to set aside a Notice To Admit does not lie, a party may serve an answer setting forth his reasons for his refusal to comply with the notice and the sanction, if any, in the event the trial court determines that such refusal was unreasonable, is the assessment of reasonable expenses incurred by the other party in proving the facts set forth in the notice. *Rowland* v. *State*, 172 N.Y.S. 2d 420 (Ct. Cl., 1957), and the decisions cited therein. Accordingly, the matters in petitioner's Notice To Admit were not admitted by the Commission.

POINT II

Petitioner's contention that under the Waterfront Commission Act he was immune from service of process and further that he was fraudulently enticed into New York by the Commission was not properly raised in the Courts below and in any event is without merit.

Petitioner makes two contentions in connection with his motion below to set aside the service herein. The first is that he was immune from process under Section 5-m of the Waterfront Commission Act (McK. Unconsol. Laws 9917) (pet., pp. 11-12, 24). Petitioner further contends that his presence in New York was the result of the Commission's fraud and deceit constituting a denial of due process (pet., pp. 13-14). Petitioner resides in Jersey City, New Jersey (R. 23), immediately across the Hudson River from New York City.

1. As in the case of the discovery order, petitioner in his notice of appeal to the Appellate Division from the final contempt order herein failed to specify that he was bringing up for review the order denying his motion to set aside the service herein (R. 2-3). Since such order was of course an intermediate order, petitioner, as in the case of the discovery order, failed to comply with the aforesaid provisions of Section 580 of the New York Civil Practice Act and accordingly this order was not reviewable in connection with petitioner's appeal from the contempt order. It therefore follows, as in the case of the discovery order, that the order herein of the Court of Appeals denying petitioner's motion for leave to appeal from the contempt order, insofar as it involved the question of service, rests upon an adequate state ground and is not subject to review by this Court. E.g., *Parker* v. *Illinois*, *supra*; *C.I.O.* v. *McAdory*, *supra*.

2. Section 5-m of the Waterfront Commission Act (McK. Unconsol. Laws 9917) provides in effect that a non-resident witness appearing pursuant to Commission subpoena is exempt from arrest and service of civil or criminal process "in connection with matters which arose before his entrance into such state under the subpoena" (pet., p. 24). The Commission has the express statutory power under the Waterfront Commission Act to issue subpoenas throughout both the States of New York and New Jersey (Art. IV, McK. Unconsol. Laws 9810). Section 5-m was enacted in order to obviate the objection by non-resident New Jersey witnesses that they may become amenable in New York to the service of other process *in an unrelated matter* and in order to conduce obedience to the Commission's subpoenas. See *In the Matter of the Application of the Waterfront Commission of New York Harbor*, 39 N. J. Super 33, 43-44 (1956), where such an objection was specifically raised by a New Jersey witness and overruled by the court. As stated, in order to obviate this objection and in order to conduce obedience to the Commission's sub poenas, Section 5-m was promptly enacted following such decision, upon the recommendation of the Commission, at the 1956 sessions of both the Legislatures of New York and of New Jersey (New York Laws 1956, c. 457; New Jersey Laws 1956, c. 19).

Accordingly, the clear intentment of Section 5-m is to encourage obedience to Commission's subpoenas by granting an exemption from process *in an unrelated matter*. Here, the petitioner was served in New York in the instant contempt proceeding after he refused to testify at the Commission's public hearings being held in New York. Thus, petitioner was not served *in an unrelated matter* but rather in aid of the very matter for which his presence was required in New York in the first instance. Compare, for example *Lamb* v. *Schmitt*, 285 U. S. 222, 226, where this Court stated, in sustaining service on a non-resident attor-

ney in the same matter in connection with which he had entered the state, that "It has never been doubted that [nonresident] witnesses, parties, and their counsel are amenable to the process or order of the court for contempt of court, committed while in attendance upon the trial, or that any of them while there, are subject to the process and orders of the court to compel the production of documents or their testimony in the cause."

The question in any event does not involve more than a nice procedural point. It is hardly an issue of such significance and importance as to warrant review by this Court.

3. Petitioner also contends that after he refused to testify at the Commission's public hearings in New York the Commission deceived him into returning to New York the next day under the false pretext that his testimony was desired and that this trickery raises a substantial question of due process (pet., pp. 13-14). The short and conclusive answer is that petitioner's presence in New York on the day of service was the result solely of the legal compulsion of the Commission's subpoena, and not of any fraud or misrepresentation. The Commission simply continued petitioner's subpoena in force for the purpose of bringing him before a court to answer for his contumacious conduct, as it had every right to do (R. 43).

Petitioner's contention that his presence in New York was obtained by the Commission's fraud and misrepresentation assumes that he had the legal right to disregard the Commission's direction to return pursuant to the Commission's subpoena if he knew that he was going to be served with contempt papers, which simply begs the entire question. Further, when petitioner was directed to return to New York the next day, there was an explicit statement by the Commission's General Counsel that the Commission would institute appropriate court proceedings (R. 43).

Finally, petitioner was given an additional opportunity by the Commission upon his return to New York to change his mind and to testify, which petitioner refused to do (R. 74-75).

POINT III

Petitioner's contention that he was not apprised of the subject matter of the investigation was never asserted before the Commission and in any event is without merit.

1. Petitioner's objection that he was never properly apprised as to the subject matter of the Commission's investigation (pet., pp. 17-18) was never asserted by petitioner at the Commission's public hearings. The grounds asserted by petitioner before the Commission for his refusal to testify at the public hearing, notwithstanding the grant of immunity from prosecution, were that the notice of immunity to the various prosecuting officials was defective and that petitioner had not been given immunity from federal prosecution (R. 17, 34-37). Since the instant objection was never raised at the Commission's public hearing, the objection was not of course properly asserted. *Barenblatt* v. *United States*, 360 U. S. 109, 123-124 (in criminal prosecution for contempt of Congress, objection to pertinency of questions is not available where this objection was not made at the time the questions were asked).

2. The objection is, in any event, entirely disingenuous. It will be remembered that the purpose of the Commission's public hearings was to determine the existence and extent of criminal influence in the ILA with a view to making legislative recommendations to the Governors and Legislatures of New York and New Jersey (R. 16). With specific reference to petitioner, the purpose of his testimony was to ascertain the facts concerning the issuance of charters for certain union locals by the ILA to criminal elements (R. 16-17).

The subject matter to be covered by petitioner's testimony had been made unequivocally clear in the prior contempt proceeding instituted against petitioner by the Commission in the courts of New Jersey (R. 109-110). Indeed, the Supreme Court of New Jersey in sustaining an adjudication of civil contempt against an identical objection by petitioner in such prior contempt proceeding stated that petitioner "was fully apprised, prior to his being called, of the subject matter of the investigation." *In the Matter of the Application of the Waterfront Commission of New York Harbor (Anthony Marchitto)*, *supra*, at page 338 (R. 132). Certainly, by the time of the public hearings which was about a month after this decision by the Supreme Court of New Jersey, petitioner knew why his testimony was wanted.

Further, the General Counsel of the Commission at the beginning of the public hearings made an opening statement as to the matters to be covered (R. 136-139). In addition, when petitioner was granted immunity from prosecution, the notices of the Commission's intention to confer such immunity upon petitioner were introduced in the record at the public hearing and these state in specific detail the subject matter to be covered by petitioner's testimony (R. 44-67).

Finally, it warrants emphasis that petitioner has been adjudicated guilty of *civil* contempt. See, for example, the decision of the Supreme Court of New Jersey sustaining petitioner's civil contempt adjudication in the prior contempt proceeding against him wherein there is a specific *quaere* as to whether this Court's decisions on criminal contempt convictions, such as *Watkins* v. *United States*, 354 U. S. 178, have any applicability to a civil contempt proceeding. *In the Matter of the Application of the Waterfront Commission of New York Harbor (Anthony Marchitto)*, *supra*, at page 337.

POINT IV

Petitioner's contention that the Commission failed to give the required statutory notice to all the prosecutors with an official interest therein of its intention to grant petitioner immunity from prosecution was never asserted before the Commission and in any event is without merit.

1. Still another of petitioner's objections to the within contempt adjudication is that the Commission failed to give the proper statutory notice of its intention to grant petitioner immunity from prosecution because the Commission did not give written notice to all the appropriate prosecutors with an official interest therein. As noted, the grounds asserted by the petitioner before the Commission for his refusal to testify at the Commission's public hearings were that he had not been granted immunity from federal prosecution and that the notice of immunity to the various prosecuting officials was defective because it set forth only the subject matter upon which the petitioner was to be questioned, and not the specific questions themselves (R. 17, 34-37). Since petitioner's present contention was never raised at the Commission's public hearings, the objection was not properly asserted. *Barenblatt* v. *United States, supra.*

2. Petitioner's contention respecting the notice of the Commission's contention to grant immunity overlooks entirely the fact that Section 5-b(5), pursuant to which the Commission granted immunity (pet., pp. 23-24), explicitly provides that the immunity granted thereunder shall be absolute even if there is a total failure to notify the appropriate public officials. This was pointed out by the New York Appellate Division with respect to a similar immunity statute in *Commission of Investigation* v. *Lombardozzi*, 7 A. D. 2d 48, 180 N.Y.S. 2d 496 (1st Dept. 1958), aff'd 5

N. Y. 2d 1026, 6 N. Y. 2d 744, 753, *cert. den.*, 360 U. S. 930:

> "When requested in these proceedings, the Commission informed each appellant that it had afforded the Attorney-General and the appropriate district attorney an opportunity to be heard in compliance with section 7 but refused to specify the details thereof. We find no error in that decision. The grant of immunity was absolute. It appears to have been the legislative intent that before such extensive power was exercised by the Commission as a matter of governmental comity, it should give certain public prosecutors an opportunity to be heard to enable them to induce the Commission to withhold the granting of such immunity for reasons advanced, which might have been unknown or overlooked by the Commission. But the opportunity to be heard was not a restriction on the power. If objections were made by prosecutors and not heeded by respondent, the witness would not be the less protected. Assuming the Commission acted improvidently in the face of objections it might be subject to correction in an official forum or otherwise. Such eventual correction, regardless of what effect it might have on the Commission, individually, or as a body, could not detract from the immunity already granted. Thus, in stating that the Attorney-General and appropriate District Attorney had been afforded an opportunity to be heard, the respondent sufficiently complied with the statute. It was not for appellants to go further into the matter. When the immunity is granted it is not at the peril of the witness but at the peril of the Commission if it fails to comply with the requirements of the statute."

Hence, petitioner was not hurt by and thus cannot complain of the Commission's alleged failure to notify all the prosecutors with an interest in the matter. Indeed, the manifest purpose of Section 5-b(5) is to preclude the very type of objection now sought to be asserted by petitioner.

POINT V

Petitioner had no constitutional right to refuse to testify upon the ground that he had not been granted immunity from federal prosecution.

Petitioner's final objection to the within contempt adjudication is that he had been granted only immunity from state prosecution and not immunity from federal prosecution (pet., pp. 14-16). Petitioner asserts that the instant investigation by the Commission was the result of collaboration between the Commission and federal agencies and, further, that in effect the Commission, which was created by an interstate compact consented by Congress, is for present purposes a federal instrumentality.

1. Section 5-b(5) of the Waterfront Commission Act, pursuant to which petitioner was granted immunity from prosecution (pet., pp. 23-24), was enacted in 1956 in New Jersey (1956 Laws of New Jersey, c. 194) and in 1957 in New York (1957 Laws of New York, c. 188) and is expressly patterned after, and substantially identical to, Section 2447 of the New York Penal Law. (See Commission's Legislative Memorandum, McKinney's 1957 Session Laws of New York, p. 2053.) In *Knapp* v. *Schweitzer*, 357 U. S. 371, this Court sustained the constitutional validity of the grant of immunity from prosecution pursuant to Section 2447 of the New York Penal Law against the same contention, as here, that no immunity from federal prosecution had been conferred. Hence, petitioner in effect requests this Court to review the selfsame statute and question as were recently involved in *Knapp*.

As a reason for issuance of certiorari herein, petitioner asserts throughout his petition that there was cooperation between the Commission and federal agencies in the instant investigation. However, this is no more than *ipse dixit* by petitioner, for there is nothing in the record herein

whatsoever to support these completely conclusory and unsupported assertions of such cooperation. Here, as in *Knapp*, "the record before us is barren of evidence that the State was used as an instrument of federal prosecution or investigation" (357 U. S. 371, 380). There is not involved herein any of the numerous elements of federal-state cooperation which were present in *Mills* v. *State of Louisiana*, 360 U. S. 230, where, notwithstanding such cooperation, this Court sustained the state grant of immunity from state prosecution. Indeed, there is not even present here, as there was in *Knapp*, the fact "that a federal prosecuting attorney announced his intention of cooperating with state officials in the prosecution of cases in a general field of criminal law [involved therein]" (357 U. S. 371, 380).

Nor does it lie in petitioner's mouth to claim that the denial of his motion for discovery prevented him from proving the existence of cooperation between the Commission and federal agencies. Plainly, a witness in a state investigation has no federal right to roam at will through the files of the state investigating agency, and to interrogate state officials, in the hope that perhaps he may happen upon some evidence of such cooperation.

2. Another basis for petitioner's claim that he was constitutionally required to be granted immunity from federal prosecution is the contention in effect that the Commission, for present purposes, is a federal agency subject to the provisions of the Fifth Amendment because it was created by an interstate compact approved by Congress. However, beyond the granting of consent to the original Compact, the federal government has had no part whatever in the creation, maintenance or operation of the Commission. In fact, Congress, in approving the Compact, expressly gave its approval to supplementary *state* legislation in accord with the objectives of the Compact (Act of August 12, 1953, 67 Stat. 541, c. 407), a "provision in the

consent by Congress to a compact . . . so extraordinary as to be unique in the history of compacts". *DeVeau* v. *Braisted*, 363 U. S. 144, 154. The law in any event is established that Congressional consent to an interstate compact does not constitute the agency created thereunder a federal instrumentality. E.g., *Hinderlider* v. *La Plata River Co.*, 304 U. S. 92 (interstate compact not a treaty or statute of United States within meaning of statute defining this Court's appellate jurisdiction); *Commissioner* v. *Shamberg's Estate*, 144 F. 2d 998 (2nd Cir. 1944), *cert. den.*, 323 U. S. 792 (Port of New York Authority is a "political subdivision" of States of New York and New Jersey within meaning of Revenue Act excluding from taxation the interest on obligations of a state or political subdivsion thereof).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

WILLIAM P. SIRIGNANO,
General Counsel of the Waterfront
Commission of New York Harbor,
Attorney for Appellee,
15 Park Row,
New York 38, N. Y.

Of Counsel:

IRVING MALCHMAN,
Assistant to the General Counsel.

Dated: December 13, 1961.

APPENDIX A

Excerpt From Petitioner's Brief in Appellate Division.

POINT I

Since this is a quasi-criminal proceeding, appellant was constitutionally entitled to a deposition as "compulsory process for obtaining witnesses in his favor."

It is well settled that contempt proceedings, whether denominated civil or criminal, are quasi-criminal in character. *Erie R. Co.* v. *Ramsey*, 45 N. Y. 637; *Bridgeman* v. *American Book Co.*, 12 Misc. 2d 63; *Sadounik* v. *Goldfarb*, 206 Misc 948; *Matter of Simington*, 147 Misc. 504.

Accordingly, the respondent in contempt proceedings is entitled to compulsory process for the purpose of obtaining witnesses in his favor. Constitution of the State of New York, Art. I, Sec. 1; Constitution of the United States, Fifth and Sixth Amendments.

In contempt proceedings of this kind the case is frequently determined upon affidavits. Without conceding the validity under the Constitution of this procedure, it requires at the very least that the alleged contemnor enjoy the benefits of compulsory process by deposition prior to the contempt proceedings.

Such a remedy is, in fact, afforded by Section 308 of the New York Civil Practice Act, which provides:

> "Testimony may be taken by deposition, under this article, in a special proceeding, or for use in such a proceeding about to be brought, as though the proceeding were an action."

The denial by Mr. Justice Backer of appellant's motion to take the Commission's deposition denied him his statutory and constitutional rights. Appellant took an appeal from that order but was not able to perfect it because of the imminence of hearing of the contempt proceedings on the merits. He urged this denial in the said proceedings (fol. 489) and has thus preserved it upon the appeal.

APPENDIX B

Excerpt From Petitioner's Brief in Special Term.

POINT I

Since this is a quasi-judicial proceeding, respondent is constitutionally entitled to a deposition as "compulsory process for obtaining witnesses in his favor."

It is well settled that contempt proceedings whether denominated civil or criminal, are quasi-criminal in character. *Erie R. Co.* v. *Ramsey*, 45 N. Y. 637; *Bridgeman* v. *American Book Co.*, 12 Misc. 2nd 63; *Sadownik* v. *Goldfarb*, 206 Misc. 948; *Matter of Simington*, 147 Misc. 504.

Accordingly, the respondent in contempt proceedings is entitled to compulsory process for the purpose of obtaining witnesses in his favor.

> Constitution of the State of New York, Art. I, Sec. 1.
>
> Constitution of the United States, Fifth and Sixth Amendments.

In contempt proceedings of this kind the case is frequently determined upon affidavits. Without conceding the validity under the Constitution of this procedure, it requires at the very least that the respondent enjoy the benefits of compulsory process in his favor prior to the contempt proceedings, namely, by deposition.

Such a remedy is, in fact, afforded by Section 308 of the New York Civil Practice Act, which provides:

> "Testimony may be taken by deposition under this article, in a special proceeding, or for use in such a proceeding about to be brought, as though the proceeding were an action."

The denial of respondent's motion to take the Commission's deposition is of course not reviewable by this Court. Respondent therefore reserves his position upon this point should an appeal become necessary.